

ELOISA SOLIS)
 Claimant)
 VS.)
) Docket No. 1,007,132
LABOR PROS)
 Respondent)
 AND)
))
CONTINENTAL WESTERN INSURANCE COMPANY)
 Insurance Carrier)

Claimant alleges she injured her low back on September 17, 2002, working for respondent. In the November 9, 2004, Award, Judge Benedict determined claimant sustained an accident that arose out of and in the course of her employment with respondent. But the Judge denied claimant's request for permanent disability benefits as the Judge concluded claimant failed to prove that she sustained any permanent injury that carried an impairment rating under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides). The Judge also assessed claimant \$278.35 in deposition costs for Dr. Edward J. Prostic's second deposition, which the Judge found was unnecessary, and denied claimant's request for future medical treatment.

Claimant contends Judge Benedict erred. Claimant argues she sustained a five percent whole person impairment under the *Guides*. Accordingly, claimant requests the Board to grant her permanent disability benefits under K.S.A. 44-510e for a five percent permanent partial general disability.

Conversely, respondent and its insurance carrier contend the November 9, 2004, Award should be affirmed.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. Who should be assessed the deposition costs of Dr. Prostic's second deposition?
3. Is claimant entitled to future medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the November 9, 2004, Award should be modified to assess respondent and its insurance carrier with the deposition costs of Dr. Prostic's second deposition. In addition, claimant may request additional medical benefits upon proper application to the Director of the Division of Workers Compensation.

Respondent and its insurance carrier do not challenge claimant's contention that she injured her low back working for respondent lifting containers of food. Accordingly, the Board affirms the Judge's finding that claimant injured her low back in an accident that arose out of and in the course of her employment with respondent, which is a temporary employment agency.

Claimant underwent a course of medical treatment with Dr. J. S. Walia and Dr. Lynn A. Curtis. Dr. Curtis, who saw claimant on two occasions in October 2002 at the Occupational Health Services clinic, concluded claimant's complaints of pain were not credible and that claimant was a symptoms magnifier. Dr. Curtis also concluded claimant did not sustain a permanent injury.

In May 2003, claimant saw Dr. Vito J. Carabetta at Judge Benedict's request for an unbiased medical evaluation. Dr. Carabetta, who speaks fluent Spanish (which is claimant's primary language), determined claimant either had a zero percent or five percent whole person functional impairment under the *AMA Guides* (4th ed.), depending upon whether her pain complaints were credible. Dr. Carabetta found no objective finding to support claimant's alleged low back pain. When she saw Dr. Carabetta, claimant had

neither muscle guarding nor muscle spasms. And using a goniometer, the doctor determined claimant had full range of motion in her low back. Claimant's only complaint was midline low back pain. Nevertheless, the doctor determined claimant might benefit from additional medical treatment such as aerobic exercise and over-the-counter medications. Dr. Carabetta did not believe claimant's condition required work restrictions.

Claimant, on the other hand, presented the testimony of orthopedic surgeon Edward J. Prostic, M.D. Dr. Prostic examined claimant in November 2002, October 2003, and February 2004. Dr. Prostic thought claimant had a disc injury at the fifth lumbar and first sacral intervertebral level. The doctor also concluded claimant had an eight percent whole person functional impairment under the AMA *Guides* (4th ed.), which he testified was a compromise between the five percent whole person functional impairment rating he found using the injury model or DRE (Diagnosis-Related Estimates) of the *Guides* and the nine or 10 percent whole person functional impairment rating he found using the Range of Motion Model of the *Guides*. Contrary to Dr. Carabetta, Dr. Prostic believed claimant had a loss of forward flexion in her low back due to her work-related low back injury. But Dr. Prostic did not use any measuring device to quantify that loss of motion.

Judge Benedict found Dr. Carabetta's opinions the most credible. Consequently, the Judge concluded claimant failed to prove she sustained a permanent injury that justified a rating under the *Guides*. The Board finds no persuasive reason to disturb that finding and, therefore, adopts it as its own. Consequently, claimant's request for permanent disability benefits should be denied.

The Board, however, concludes that respondent and its insurance carrier should be responsible for the \$278.35 in deposition costs for Dr. Prostic's second deposition. In January 2004, respondent and its insurance carrier deposed Dr. Carabetta, who testified that Dr. Prostic may have seen claimant too soon after her September 2002 accident to determine whether she had sustained a permanent injury. After Dr. Carabetta's deposition, Dr. Prostic saw claimant in February 2004, which was the last of their three visits. In May 2004, claimant deposed Dr. Prostic a second time ostensibly to counter Dr. Carabetta's testimony. Under these particular circumstances, the Board finds that Dr. Prostic's second deposition was not duplicative and claimant did nothing wrong in deposing Dr. Prostic a second time. The Board concludes respondent and its insurance carrier, rather than claimant, should be responsible for the deposition costs associated with Dr. Prostic's May 2004 deposition.

Based upon Dr. Carabetta's testimony, additional medical treatment may be appropriate. Accordingly, claimant may pursue additional medical treatment upon proper application to the Director.

AWARD

WHEREFORE, the Board modifies the November 9, 2004, Award by assessing the \$278.35 in deposition costs against respondent and its insurance carrier. Moreover, claimant may pursue additional medical treatment by proper application to the Director. The remainder of the Award is affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director